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Attorneys for Defendant
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LIVING ESSENTIALS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| HANSEN BEVERAGE COMPANY, a Delaware corporation,<br><br>Plaintiff,<br><br>v.<br><br>INNOVATION VENTURES, LLC dba LIVING ESSENTIALS, a Michigan corporation,<br><br>Defendant. | Case No. 08-cv-1166 IEG (POR)<br><br>**LIVING ESSENTIALS' EX PARTE APPLICATION FOR DISCOVERY TO RESPOND TO MOTION FOR PRELIMINARY INJUNCTION**<br><br>Courtroom.: 1, Fourth Floor<br>Magistrate: Lousia S. Porter<br><br>Date Filed: 07/01/08 |

## I. INTRODUCTION

Hansen Beverage Company ("Hansen") filed a Motion for Preliminary Injunction seeking to enjoin the defendant Innovation Ventures, LLC ("Living Essentials") from selling a product called 5-HOUR ENERGY®, a 2 oz. liquid, dietary supplement that has produced over $150,000,000 in revenue to Living Essentials over the last four (4) years. In effect, Hansen's motion seeks to shut down defendant's entire business without any discovery on the merits.

Hansen claims that the name 5-HOUR ENERGY® is misleading and that claims made on the bottle of 5-HOUR ENERGY® are false. In support of its motion, Hansen submitted an alleged "expert" opinion from an in-house physiologist employee, Dr. Thomas Davis, in support of its claims that Living Essentials' advertising is false. Hansen also submitted a declaration of its CEO, Rodney Sacks, stating that Hansen will be irreparably harmed if the injunction does not issue.

In this motion, Living Essentials seeks discovery to allow it to properly respond to Hansen's motion and a continuance of the hearing to accommodate a short discovery period. Living Essentials' counsel contacted Hansen's counsel to request this discovery. Hansen denied the request. (*See* Declaration of Nathan Hamler, submitted herewith, ("Hamler Decl."), Ex. A, ¶ 4). Hansen does not want discovery on its motion because it knows that discovery will demonstrate that its employee expert, Dr. Davis' declaration was at best misleading, and that Hansen's claims of irreparable harm are specious given Hansen's knowledge about 5-HOUR ENERGY® for years.[1]

Good cause exists to permit Living Essentials to take discovery and to continue the hearing date. Given the sweeping relief Hansen seeks—removal of Living Essentials' widely successful 5-HOUR ENERGY® product from the market -- Living Essentials should be given sufficient opportunity to take discovery on issues raised in Hansen's motion, any defenses thereto, and the irreparable harm Hansen alleges it will suffer if an injunction does not issue.

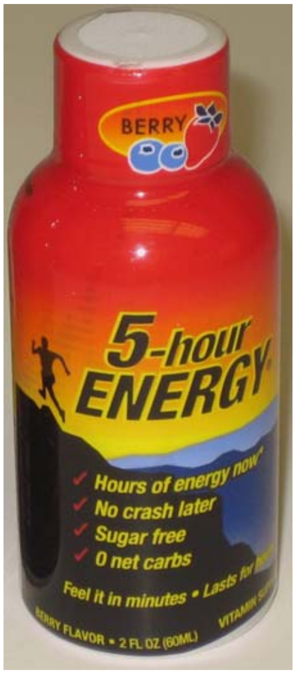
In conjunction with this motion, Living Essentials has filed an Ex parte Motion for Continuance of the Preliminary Injunction Hearing to allow time for this discovery to go forward.

[1] Indeed, not coincidently, Hansen is planning this quarter to release a 3oz. "energy drink" (Hansen's current energy drinks come in 16, 24 and 36 oz. cans) to directly compete with 5-HOUR ENERGY®. The motive behind Hansen's preliminary injunction motion is clear – knock out the market leader while introducing its own product to replace it.

## II. BACKGROUND FACTS

### A. Living Essentials Product

Over the last four (4) years, Living Essentials has sold a 2 oz. supplement under the 5 HOUR ENERGY® Trademark as illustrated below.


BERRY
5-hour ENERGY
Hours of energy now
No crash later
Sugar free
0 net carbs
Feel it in minutes
BERRY FLAVOR • 2 FL OZ (60ML)

The 5 HOUR ENERGY® supplement has been widely successful. In just four years, revenue from the sales of the 5 HOUR ENERGY® product has exceeded $150,000,000. Living Essentials has also invested substantially in advertising and marketing. Living Essentials has spent over $40,000,000 in advertising and marketing in connection with the 5 HOUR ENERGY® product. Living Essentials is the market leader in this 2 oz. liquid, supplement market.

### B. Hansen's Monster Energy Products

Hansen markets "energy drinks" under the name Monster®. These Monster energy drinks currently come in 16, 24 and 36 oz. sizes, a can is shown below:

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MONSTER
ENERGY DRINK

Hansen is on the verge of introducing its own 3 oz "energy shot," as Hansen calls it. (Hamler Decl., Ex. B, Hansen Q2 2008 Earnings Call transcript at 4.) Hansen appears to have been monitoring the 2oz "energy shot" market for quite some time, waiting for it to grow before introducing its own product. (*Id.* at 11.) Hansen's CEO Sacks recently stated:

> We think [energy shots] will remain a niche within the energy category. But it will be part of it and if it's part of it you know we don't see any reason why we shouldn't be playing in that category and be a part for that reason we took the decision. **We sort of saw and wanted it to mature it to a sufficiently high level to justify the costs and focus of launching products and putting efforts and manpower behind it.**

*Id.* If Hansen has been monitoring this market, it has been aware of Living Essentials' popular, market-leading 5 HOUR ENERGY® product.

Hansen announced that it wanted to "quickly" release its new energy shot, which would directly compete with Living Essentials' product, and expects to do so next quarter. (*Id.* at 4.)

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## III. ARGUMENT

### A. This Court Should Grant Defendant's Application For Discovery And Continue The Preliminary Injunction Hearing

Living Essentials needs discovery from Hansen to enable it to fully and fairly respond to Hansen's preliminary injunction motion. The information Living Essentials seeks is only available through discovery and without it Living Essentials would be unfairly prejudiced. Moreover, discovery will create a better record on which the Court can decide the preliminary injunction motion. Given that the complained of activity has been ongoing for four (4) years and given Hansen's knowledge of it, Hansen could not possibly be prejudiced by a continuation of the hearing on its motion for a short discovery period.

#### 1. Living Essentials Need Only Demonstrate That Good Cause Exists For Expedited Discovery

The Federal Rules generally provide that a party may not initiate discovery before the parties have met and conferred pursuant to Fed. R. Civ. Pro. 26(f). See Fed. R. Civ. Pro. 26(f). However, Fed. R. Civ. Pro. 26(d) provides that the Court may authorize earlier discovery "for the convenience of parties and witnesses and in the interests of justice." Further, under Fed. R. Civ. Pro. 30(a) the Court can grant plaintiff leave to take a deposition prior to the Rule 26(f) meeting of the parties, and Rules 33 and 34(b) expressly provide that a Court may allow a shorter time than normal for answering interrogatories and producing documents.

A court may grant requests to take discovery prior to the parties' meeting under Rule 26(f) where the requesting party demonstrates good cause. *Semitool, Inc. v. Tokyo Electron America, Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002). "Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." *Id.* "It should be noted that courts have recognized that good cause is frequently found in cases involving claims of infringement and unfair competition." *Id.*

Moreover, expedited discovery will be granted more generally where, as here, the plaintiff seeks injunctive relief. *See, e.g., RDS Group Ltd. v. Davison,* No. 02-8168, 2003 LEXIS 1337 (E.D.Pa. Jan. 17, 2003)(granting expedited discovery for pending preliminary injunction hearing);

*TKR Cable Co. v. Cable City Corp.*, 1996 U.S. Dist. LEXIS 11941, at *27-34 (D.N.J. 1996)(confirming previously ordered expedited discovery in conjunction with preliminary injunctive relief); 6 MOORE'S FEDERAL PRACTICE 3d § 26.121, at pp. 26-296 to 26-298 ("expedited discovery is particularly appropriate when a plaintiff seeks injunctive relief"); 8 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2104, at p. 51 (1999)(expedited discovery should be granted when circumstances exist "that would be likely to prejudice the party if he were compelled to wait the required time"); see also *Commodity Futures Trading Com'n v. Int'l Fin. Services*, 2002 WL 1801723 (S.D.N.Y. 2002); (ordering expedited depositions and document production from third parties); *FTC v. Ontario, Inc.*, 2001 WL 34135319 (N.D.Ga. 2001) (ordering expedited depositions of third parties on 24 hours notice).

**2. Good Cause Exists for Expedited Discovery Given the Complexity of the Issues, the Magnitude of the Relief and the Absence of any Prejudice to Hansen**

Good cause exists to warrant Living Essentials taking expedited discovery to allow it to adequately respond to Hansen's motion for preliminary injunction. Hansen's motion is a complex motion supported by both a fact declaration and an "expert" declaration that seeks sweeping relief—removal of Living Essentials' market leading 5-HOUR ENERGY® product from the market, effectively destroying defendant's business.

Although Living Essentials strongly believes that there are substantial questions as to Hansen's likelihood of success and ability to establish irreparable harm, Living Essentials should be given sufficient opportunity to take discovery on issues raised in Hansen's Motion for Preliminary Injunction, any defenses thereto, and the irreparable harm Hansen alleges it will suffer if an injunction does not issue given the sweeping relief Hansen seeks.

Hansen's motion addresses complex scientific issues. In support of its motion, Hansen submitted the "expert" opinion of Thomas P. Davis, a Hansen employee with a doctorate in physiology. (Dkt. #7, Ex. 3.) Living Essentials needs discovery to test Dr. Davis' conclusions and to submit its own expert declaration, if necessary.

Hansen also submits the declaration of its CEO, Rodney Sacks, who asserts that Living Essentials use of the name 5-HOUR ENERGY®, as well as its advertising, has caused Hansen irreparable harm that must be immediately stopped. (Dkt. #7, Ex. 2, ¶33.) In the declaration, Sacks notes that Living Essentials has been selling its product for years; yet, he does not explain why Hansen only recently came under the threat of irreparable harm. *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir.1985)("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm ." ) Living Essentials needs discovery to test Hansen's factual claims that Hansen will be irreparably harmed absent an injunction[2].

Moreover, Hansen's motion seeks to prevent Living Essentials from using the very name and bottle advertising that it has used for four (4) years. Living Essentials estimates at this time that it stands to immediately lose tens of millions of dollars if Hansen's preliminary injunction motion is successful and Living Essentials is enjoined from selling its 5-HOUR ENERGY® brand supplement under the trademark it has used for nearly four (4) years. This figure does not account for customers and shelf space Living Essentials will likely permanently lose as a result of keeping its 5-HOUR ENERGY® product off the shelves, the harm such an injunction would impose upon Living Essentials' relationships with distributors and retailers and other business partners, or other collateral damage resulting from the injunction Hansen seeks. Given the drastic relief sought by Hansen, and the devastating effects it would have on Living Essentials' business, the interests of justice require allowing Living Essentials to conduct expedited discovery prior to responding to Hansen's preliminary injunction motion.

The expedited discovery Living Essentials seeks is limited and specifically tailored to Hansen's claims in its preliminary injunction motion, any defenses thereto, and Hansen's claims of irreparable harm. As an example only, Hansen asserts that Living Essentials' advertisements have "adversely affected Hansen's sales," and that "Hansen has suffered and continued to suffer irreparable harm as a result of Living Essentials' false statements." (Dkt. #7, Ex. 2, ¶33.) Hansen has provided no documentation or economic analyses supporting these assertions. Given what is at stake in this motion, Living Essentials is entitled to obtain the foundation of this speculative testimony (if any) and to test its credibility and veracity.

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[2] In a telephone conversation with Hansen's counsel discussing a stipulation to this discovery, Hansen's attorney asserted that discovery on irreparable harm was not necessary given that it is presumed, as indicated in Hansen's brief. Hansen is applying old law. After *eBay v. MercExchange LLC*, 547 U.S. 388 (2006), courts no longer apply this presumption. *North American Medical Corp. v. Axiom Worldwide Inc.*, 522 F.3d 1211 (11th Cir. 2008)(presumption of harm not applied in preliminary injunction analysis after Supreme Court's *eBay* decision.); see also *Tillery v. Leonard & Sciolla, LLP*, 437 F. Supp. 2d 312, 329 (E.D. Pa. 2006)(denying motion for a preliminary injunction).

Nor will Hansen be prejudiced by allowing Living Essentials to take discovery. Any delay will likely be less than two or three months. Hansen has likely known about 5-HOUR ENERGY® for years, an additional, short delay will in no way prejudice Hansen.

Good cause clearly exists to permit Living Essentials to take expedited discovery in order for it to properly respond to Hansen's motion for preliminary injunction.

**3. The Discovery Sought by Living Essentials**

Living Essentials seeks the following limited discovery:

- Fifteen (15) document requests and five (5) interrogatories directed to the issues raised in the Hansen preliminary injunction motion and any Living Essential defenses, returnable fifteen (15) days from the date of service;
- Deposition of Hansen pursuant to Fed. R. Civ. P. 30(b)(6);
- Depositions of witnesses who submitted declarations in support of Hansen's preliminary injunction motion;
- Two half-day depositions of other witnesses discovered with information directed to the issues raised in the Hansen preliminary injunction motion and any Living Essentials defenses.
- Discovery from any third parties with information relevant to the Hansen preliminary injunction motion and any Living Essentials defenses.

Living Essentials seeks the above-described discovery specifically to respond to Hansen's preliminary injunction motion. Although Living Essentials intends to limit its discovery solely to the issues raised in the papers submitted by Hansen and any defenses, in doing so, Living Essentials in no way waives its ability to take more discovery of Hansen and/or the above-identified witnesses and third parties at a later time in the litigation. Living Essentials' goal in seeking discovery at this stage of the litigation is merely to test and gather information regarding Hansen's claims of liability and irreparable harm and any defenses thereto.

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## IV. CONCLUSION

Living Essentials respectfully requests that the Court enter an order allowing it to take limited, expedited discovery concerning matters raised by Hansen's preliminary injunction motion and any defenses thereto.

Respectfully submitted,

Dated: August 21, 2008

MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO PC

By *s/Nathan Hamler*
Nathan R. Hamler, Esq.

Attorneys for Defendant
INNOVATION VENTURES, LLC dba
LIVING ESSENTIALS

Mark A. Cantor (MI Bar No. P32661)
*Pro Hac Vice Application Anticipated*
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Telephone: (248) 358-4400
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## CERTIFICATE OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of San Diego, State of California, and am not a party to the above-entitled action.

On August 21, 2008, I filed a copy of the following document(s):

**LIVING ESSENTIALS' EX PARTE APPLICATION FOR DISCOVERY TO RESPOND TO MOTION FOR PRELIMINARY INJUNCTION**

by electronically filing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

| | |
|---|---|
| Norman L. Smith, Esq.<br>Edward J. McIntyre, Esq.<br>Alison L. Pivonka, Esq.<br>**SOLOMON WARD SEIDENWURM & SMITH**<br>401 B Street, Suite 1200<br>San Diego, CA 92101<br>(619) 231-0303 | Attorneys for Plaintiff<br>HANSEN BEVERAGE COMPANY<br><br>nsmith@swsslaw.com<br>emcintyre@swsslaw.com<br>apivonka@swsslaw.com |

Executed on August 21, 2008, at San Diego, California. I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

*s/Nathan Hamler*
Nathan R. Hamler, Esq.

4410968v.1

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Attorneys for Defendant
INNOVATION VENTURES, LLC dba
LIVING ESSENTIALS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| HANSEN BEVERAGE COMPANY, a Delaware corporation,<br><br>Plaintiff,<br><br>v.<br><br>INNOVATION VENTURES, LLC dba LIVING ESSENTIALS, a Michigan corporation,<br><br>Defendant. | Case No. 08-cv-1166 IEG (POR)<br><br>**DECLARATION OF NATHAN R. HAMLER IN SUPPORT OF APPLICATION FOR EXPEDITED DISCOVERY**<br><br>Courtroom.: 1, Fourth Floor<br>Judge: Irma E. Gonzalez<br><br>Date Case Filed: 07/01/08 |

I, NATHAN R. HAMLER, DECLARE AS FOLLOWS:

1. I am an attorney at law duly licensed to practice law in the State of California, and am an associate with the law firm of Mintz Levin Cohn Ferris Glovsky and Popeo, P.C, counsel for defendant Innovation Ventures, LLC dba Living Essentials. I have personal knowledge of the facts set forth in this declaration and could and would competently testify as to the same.

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2. On or about Friday, August 8, 2008 plaintiff in this action filed a motion for a preliminary injunction. The hearing date on that motion is currently set for Monday, September 15, 2008.

3. On Thursday, August 14, 2008, I am informed and believe that co-counsel for the defendant in this action, Thomas Cunningham, Esq. of BROOKS KUSHMAN P.C. sent an email, a true of copy of which is attached as Exhibit A to this declaration, requesting that plaintiff agree to stipulate to continue the hearing on its motion for a preliminary injunction and allow defendant to take expedited discovery in advance of defendant's opposition to that motion and the hearing on that motion.

4. I am also informed and believe that counsel for plaintiff, Ed McIntyre, Esq. of SOLOMON WARD SEIDENWURM & SMITH, LLP, responded to the August 14 email by telephone, and indicated that plaintiff would neither stipulate to a continuance of the ex parte application or stipulate to allow defendant's expedited discovery.

5. Attached as Exhibit B to this declaration is a true and correct copy of a document downloaded from the Internet, entitled "Hansen Natural Corp. Q2 2008 Earnings Call Transcript."

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this declaration is executed this 21st day of August, 2008 at San Diego, California.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this declaration is executed this 21st day of August, 2008 at San Diego, California.

*s/Nathan Hamler*
Nathan R. Hamler

# CERTIFICATE OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of San Diego, State of California, and am not a party to the above-entitled action.

On August 21, 2008, I filed a copy of the following document(s):

**DECLARATION OF NATHAN R. HAMLER IN SUPPORT OF APPLICATION FOR EXPEDITED DISCOVERY**

by electronically filing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Norman L. Smith, Esq.
Edward J. McIntyre, Esq.
Alison L. Pivonka, Esq.
**SOLOMON WARD SEIDENWURM & SMITH**
401 B Street, Suite 1200
San Diego, CA 92101
(619) 231-0303

Attorneys for Plaintiff
HANSEN BEVERAGE COMPANY

nsmith@swsslaw.com
emcintyre@swsslaw.com
apivonka@swsslaw.com

Executed on August 21, 2008, at San Diego, California. I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

*s/Nathan Hamler*
Nathan R. Hamler, Esq.

4410931v.1

# EXHIBIT A

**Hamler, Nathan**

**From:** Tom Cunningham [TCUNNINGHAM@brookskushman.com]
**Sent:** Thursday, August 14, 2008 3:05 PM
**To:** emcintyre@swsslaw.com
**Subject:** Hansen v. Innovation

Mr. McIntyre:

My firm represents Innovation Ventures.

We have received Hansen's Motion for Preliminary Injunction. We believe that limited discovery in necessary in order to respond to Hansen's motion.

Our proposal is that defendant be allowed to take discovery directed to the issues of Hansen's motion and any of Innovation's associated defenses. We believe that we can accomplish our goals in responding to the motion with the following limited discovery: 1) 5 interrogatories, 2) 15 document requests, and 3) 5 depositions lasting no more than 21 hours total (we anticipate a 30(b)(6) deposition and individual depositions of Sacks, Davis, and 1 or 2 others identified in discovery).

We would also propose that the time for responding to discovery requests be limited to 5 days for objections and 15 days for substantive responses, given the claimed urgency in your motion.

Given the need for discovery, we also request that the hearing be re-scheduled for October 13, 2008 to allow defendant to complete discovery and file a responsive brief.

If you are willing to stipulate to our request, please indicate as such and I will prepare a joint motion. If not, please also let me know and I will file an appropriate motion. I respectfully request that you respond by end of business on August 15, 2008.

Thank you for your prompt attention to this matter.

Regards,

Tom

Thomas W. Cunningham, Esq.
Brooks Kushman P.C.
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22nd Floor
Southfield, MI 48075
main: 248-358-4400
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tcunningham@brookskushman.com

# EXHIBIT B

Seeking Alpha α

# Hansen Natural Corp. Q2 2008 Earnings Call Transcript

posted on: August 08, 2008 | about stocks: HANS

Hansen Natural Corp. (HANS)

Q2 FY08 Earnings Call

August 7, 2008, 05:00 PM EST

**Executives**

Rodney C. Sacks - Chairman and CEO

Hilton H. Schlosberg - Vice Chairman, President, CFO, COO and Secretary

**Analysts**

Judy Hong - Goldman Sachs

Kaumil Gajrawala - UBS

Mark Astrachan - Stifel Nicolaus

Gregory Badiskanian - Citigroup

Alex Paterson - RCM

**Presentation**

**Operator**

Good day, everyone and thank you for joining today's Hansen Natural Corporation's Second Quarter 2008 Financial Results Conference Call. Today's call is being recorded. For opening remarks, I'd like to turn the conference over to Chief Executive Officer, Mr. Rodney Sacks. Please do ahead sir.

**Rodney C. Sacks - Chairman and Chief Executive Officer**

Thank you. Good afternoon, ladies and gentlemen. This is Rodney Sacks speaking. Hilton Schlosberg, our Vice Chairman and President, he is with us today as is Tom Kelly, our Vice President of finance.

Firstly, I would like to thank you for attending the call and at this time, I would like to record that certain statements made on this call may constitute forward-looking statements within the meaning of Section 27A of the Securities Act of 1933 as amended and Section 21E of the Securities Exchange Act of 1934 as amended, regarding the expectations of management with respect to revenues and profitability.

Management cautions that these statements are qualified by their terms, or important factors many of which are outside the control of the company that could cause actual results and events to differ materially from the statements made herein. The company assumes no obligation to update any forward-looking statements.

At the onset, I would like to apologize, I understand there was some delay in our results being transmitted across the wires and through the internet and this was due to circumstances beyond our control. They were released on yesterday, but that was apparently summing that just occurred... there were tremendous amount of other companies also reporting results at the same time after the close today.

But I understand that both the release has now gone across the internet and the 8-K has also been filed and has gone across the internet.

Our results for the quarter underscore our ability to continue delivering growth in both sales and profits despite the challenging macro economic environment in the United States. During the quarter, almost all categories of ready to drink beverages in the United States experienced weakness. This weakness is most pronounced in convenience store cold drink channels, where the vast majority of energy drinks are sold. We continue to believe that the moderating growth we have seen in energy drinks appears in part due to the challenging macro economic environment and the resulting decline in store traffic, primarily in the C&G sector, especially in Southern California.

We have seen a noticeable fall off in sales all for example, our 24-ounce sized packages in Southern California, which is consistent with the above. Although our sales of regular and low-carb Monster Energy Drinks increased, as did their respective market shares.

In fact, I'm proud to report that according to latest Nielsen's, Monster Energy and 16-ounce cans i.e. our Green Monster is now the highest selling item in the energy category in the United States. And our low-carb Monster Energy in 16-ounce cans is also now the best selling low carb or diet item in the energy category in the United States. This is a remarkable milestone that we've achieved in overtaking the leading Redbull item in the category.

According to AC Nielsen, for the 13 weeks ended June the 28, 2008 all outlets combined, convenience, grocery, drug and mass excluding Wal-Mart, the energy category as defined by Hansen Natural, grew by 13.7% over the comparable period in 2007.

Monster sales increased 42.5%, while its market share increased to 28.3% from 22.6% last year, and also increased from 26.9% at the end of the first quarter of 2008. Red Bull's sales increased by 11.3%, while its market share decreased to 35.7% from 36.5% last year and 37.3% at the end of the first quarter of 2008.

It is noteworthy that Rockstar sales decreased by 0.7 of a percent and its market share decreased to 10.8% from 12.4% in the previous year and from 11% at the end of the first quarter of 2008. Pepsi's Amp sales increased by 59.9%, primarily due to the introduction of new SKUs and expanded distribution. Amp's market share increased to 7.9% from 5.6% a year earlier.

However, Pepsi's No Fear and Adrenaline Rush brands both locked substantial market share and are now down to 1.8% and 1.4% market shares respectively.

Finally, Coke's Full Throttle brand sales decreased by 16% and its market share decreased to 4.8% from 6.5% last year. However, its NOS energy brand increased its market share to 2.6% from 1.1% last year, also largely due to new SKUs being introduced and expanded distribution.

I would like to refer to the growth rates on some of the individual items. What is important to us for example, in looking and assessing the strength of a brand is to look at for example the main or fledge of SKU. In the case of Monster 16-ounce Green Energy, the main brand grew 16% in convenience and gas and it sales point grew 6.7%.

When compared with the leading Red Bull 8 or 12-ounce sizes, the Red Bull 8-ounce size can product dropped sales dropped 14.6% versus last year and on a sales per point, also dropped 14.6%. Their 12-ounce pack dropped size can product dropped 8% in dollar sales and 19.6% on a sales per point basis.

The leading Rockstar products dropped... energy drink in 16-ounce cans dropped 11.3 percentage points versus last year and it sales on a sales per point basis dropped 7.4%. Amp, which has seen an increase in the sales for the brand however they are leading SKU, their flagship product drop... was up only 5.3 points in the sales and on a sales per point basis were down 2.3%.

Full Throttle, leading product is down 10.6% in sales and on a sale per point down 9.4. Even NOS, which is a brand which was up substantially on sale due to the increased distribution primarily is up at 134% increase in sales in aggregate, but on a sales per point dropped 20.7%.

When compared against admission against our competitors, you can see that the Monster Energy drink has continued to show positive growth both in sales and growth per point. And as we indicate earlier is now the leading item in the energy category.

Club store sales of energy drinks has generally been up around the county but California has seen a decrease in sales in percentages across all brands, certainly there also appears to have been a drop of in-sales in some of the independent stores in the U.S. again, particularly focused in California. So those non-measured channels appear to have been more severely impacted by economic conditions, particularly in California.

Sales of Java Monster represent approximately 10% of the total sales of the Monster brand, which is lower than about 16% that it represented in the first quarter. I will also point out that in the sales number that have been released, sales in the six-month period were negatively impacted by the buying at the end of 2007, ahead of the price increase and we estimate that was between up 3% to 4% of the total sales for the six-month period. I think that is probably... is that correct?

**Unidentified Company Representative**

I think it's a little bit more like 21 million over 280.

**Rodney C. Sacks - Chairman and Chief Executive Officer**

You just check that it is for the six months sales, six months period. I'll just get that confirmed, I apologize. Sales to retail grocery decreased from 8% to 7.2% and sales to club stores, drug chains and mass merchandisers decreased from 14.3% to 14.2%, or sales full service distributors increased from 73.1% to 73.8%. So sales through distributors decreased from 1.8% to 1.5% while other sales were flat.

International sales for the second quarter were nearly 6% compared to 4.8% last year. Gross sales outside of California increased from 72.8% last year to 76.5% this quarter. In the DST division, sales outside of California represent 81.1% of that divisional sales, up from 77.9% last year. Gross sales to customers outside of the United States increased from $13.4 million to $19.5 million.

In the first six months of 2008, we experienced increased cost of certain raw materials, principally apple juice concentrate, aluminum cans and sugar, which had a greater impact on the warehouse segment than the DST segment. Although dairy prices were lower, at the end of the quarter, we did start to see higher diary cost coming through. We believe that dairy cost will increase in the second half of the year, although we still believe that the gross profits that we are able to generate from our Java Monster product in the second half of the year will be higher than we were able to achieve during the last year.

We're also hopeful that apple juice concentrate prices will come down during the second half of this year. The figure I did give you earlier is correct for the impact on the volume.

Turning to the balance sheet, I pointed out that outstanding receivables stood at 28.4 days at June 30, down from 28.7 days in December and 33.9 days last year. Inventory was $123.2 million, up from $98.1 million at December. The increase in inventory is primarily attributable to increased raw materials and finished products of Monster and in particular Java Monster. And this was to ensure that we were able to meet demands during our peak selling season.

Average days of inventory was 82 days at June 30, 2008, which is higher than the 73 days of inventory at December 31, 2007 and 68 days at June 30, 2007.

We hold auction rate securities having a face value of $129.8 million at June 30, 2008. There were $207.5 million at March 31, 2008 that had experienced failed auctions. Additional redemptions amounting to $8.9 million were received by us in July. These securities continue to accrue interest at the contractual rights until their respective auctions either to succeed or they are redeemed.

Based on our availability to excess cash and other short term investments and our expected operating cash flows, we do not anticipate that the current lack of liquidity of these investments will have a material effect on our liquidity or working capital.

We're continuing to make progress internationally. Sales in the second quarter in the United Kingdom increased to some $1.9 million. Total losses attributable to the United Kingdom start-up operations were $2 million in the first quarter and about $3 million in the second quarter, due largely to FPs and event sponsorships incurred during the quarter.

We are continuing to secure additional listings for our product and as sales levels improve, the trading losses that we have incurred in the United Kingdom to date will be reduced. Obviously, the sponsorships were focused on the second quarter because that was the story to get into summer in the United Kingdom which has a short summer season and that's when we were focused on that.

These start up costs... basically, if when taken into account with respect to our results, had an impact of about $0.03 all together on our results, approximately $1 million in the first quarter... sorry, $0.01 in the first quarter and $0.02 in the second quarter.

So if one looks at our sales, our results on a percent basis, we believe that it should be factored in our results, these are one-off [ph] costs and obviously as we as we go forward we believe that we will achieve profitability reasonably quickly and then we will make up those costs. But for assessment proposes and other purposes, even those numbers should be taken into... factored into account.

We... subsequent to the end of the quarter, we commenced selling Monster Energy drinks in Sweden and Spain and we expect to commence sales of Monster Energy in Ireland in the next few weeks. We are continuing to make progress in South Africa, where we are securing additional listings and sales are increasing.

Our sales both in Canada and Mexico continue to improve and we are continuing to gain market share in both of these countries. On the Hansen Natural side, we are continuing with the roll out of our 40 beverages in 10.5 ounce sleek cans.

Gross sales for July were approximately $11.3 million some 20% higher than gross sales in July 2007. Sales of Monster and Java Monster in July were approximately 21.5% higher than last year. We are continuing to make progress in the on premise channel. The securing of the South West Airlines account was a great achievement for the company and we have now managed to secure the availability of Monster on a regional airline. We continue to see strong growth in the on premise channel with over 3000 accounts now selling Monster. Last quarter being the total number out there selling Monster to more than 14,000 on premise accounts.

We have seen the emergence of a small niche for energy shots in small size containers approximately 2 ounce sizes. These products are usually placed on check out counters in convenience stores and are very much an impulse purchase. As sales of these products have continued to increase, we decided to launch a Monster Hitman energy shooter in a 3 ounce size container which is a black container. We completed... have competed the formulation and the design of the product and anticipate launching Hitman later this quarter.

We are also planning to launch certain new additional lines of Monster energy products before the end of the year but it would be premature and not appropriate for us to divulge further details in this regard at this time. In conclusion I reiterate that we remained extremely excited by the strength of the energy category in the current economic environment.

We believe that the economy will stabilize in the near future and when consumer confidence is restored, the energy category will rebound and continue its growth trajectory ahead of that of traditional beverages and other categories which we believe will continue to reflect positively for the company.

We are continuing to evaluate other opportunities internationally and to place additional resources behind the expansion of Monster internationally. Additionally we are test marketing a new product non-carbonated enhanced water under the trade... brand name of Hydration in selected markets in Southern California and as and when we are able to measure the results of that brand in those channels, we'll consider rolling out the brand more widely and will keep investors updated with respect to the roll out at our interim conference call.

I will now open the floor to question.

Question And Answer

**Operator**

Thank you. [Operator Instructions]. We'll go first to Judy Hong with Goldman Sachs.

**Judy Hong - Goldman Sachs**

Hello everyone.

**Rodney C. Sacks - Chairman and Chief Executive Officer**

Hi Judy.

**Judy Hong - Goldman Sachs**

When I look at your sales number. For the quarter it was up 15.5%. When you gave us the April number on the last conference call it has been running up 29%. So it implies that the sales numbers still down pretty dramatically in May and June and then it sounds like a picked up to about 20% in July. So can you just walk us through what happened in May and June and then what we think is driving the improvement in July?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

There was a slowdown in June, you were correct and there was a slowdown in May. So you didn't get the months right which was quite... quite substantial. It then picked up in June and it has picked up further in July. You know why the reason for that, I simply... we don't know.

**Judy Hong - Goldman Sachs**

Okay and then just sort of trying to again reconcile some of the Nielsen numbers that you have given us versus the gross sales number that you are reporting, it seems like disconnects seems to be getting bigger. It looks like in the Nielsen number shows 42% or something like that, it increased for Monster and again your gross sales numbers was much lower than that and that gap seems to be widening in more recent quarters. So do you have an explanation in terms of why do you think that the gap seems to be widening in the... in the Nielsen numbers versus what you're reporting?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

We don't have an explanation. We've obviously noted that... that... that gap, the Nielsen numbers are an extrapolation of actual sales out of retail outlets. We obviously only... can only work on our sales numbers and shipments into our distributors, and from them, into... to retailers. They're all major channels. These are the measured chain channels. There is a large number of independent stores that... that basically starting to sell out product. They aren't measured by Nielsen.

There are also a number of... unmeasured channels, for example, the club stores, and we know that club stores which have traditionally been large purchasers of our products, and you know, and do have a substantial business in the energy drink sector, have clearly seen some falloff in their sales, nationally, although they are still up nationally. Generally that is our understanding, except for California. We understand club stores generally throughout California have all been severely impacted by the economic downturn and are all showing negative numbers for energy in California, and that is not only attributable to... to the best we were able to ascertain, not only to our brand, but also to the other brands that they stock.

It's a little more difficult for us. We were able to give information over here about our brand, but the... the club stores don't directly share the information with regard to the competitive brands, but as I've said, from what we've been able to glean from... from those chains, all of their brands are down similarly. So that is one of the... the reasons that we've seen a difference between Nielsen and our own sales numbers.

But other than that we did obviously believe that for a period of time there was quite extensive de-stocking going on throughout the U.S. just people putting in their belts and just making sure they had less inventories on hand. We would have thought expect to that to have worked through the system now and that is all we can say.

All we know is that we look at the numbers of Neilson which are measuring actual ring through but at the same time, they... it is an extrapolation from a selected number of sample of stores and we have no other... we're continuing to sell our products to the same distributors, to the same stores in the same way. But, that is the only explanation we can give. We measure ourselves through from Neilson but we always look our own sale but we all, as we've indicated, we're seeing a pick up in sales and when you look at the sales of Monster within the company they are north of 20%. So you know that's the only explanation we can give to you on in that regard.

**Judy Hong - Goldman Sachs**

Okay, and then if I look at your operating expenses as a percent of sale it looks like it declined pretty substantially from the first quarter even though you've started to incur even more startup cost in Europe. So can you just explain some of the factors that drove the sequential decline from first quarter to second quarter in terms of the SG&A expenses?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

I think a part of that was driven by you have to back out the, that is only cost relating to distributed terminations and, the legal fees et cetera. And I think that had an impact, I don't think that on a sequential basis we would have, if you take that impact out that there would be a substantial decline.

**Judy Hong - Goldman Sachs**

Okay, last question on Java you said the mixed decline sequentially to 10%. Can you talk about the competitive landscape obviously you've seen more products coming to the marketplace. What's happening from a competitive standpoint and Java's ability to get more shelf basis?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

So I just got back before just to the other question, I'm just looking at some of those numbers now for first quarter on, if you take some of those other numbers out. And basically we are not seeing a decline sequentially either in distribution or all the SG&A and payroll are all basically up, inline with increased sales and increased marketing. So I think that effected just because of that you got to backup those other extraordinary expenses.

**Judy Hong - Goldman Sachs**

If I look at numbers in the first quarter your operating expenses up 57%. You back out those numbers and it looks like this quarter was up close to 25%?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

But then you pricing that also previous year.

**Judy Hong - Goldman Sachs**

Right.

**Rodney C. Sacks - Chairman and Chief Executive Officer**

That I cannot tell you, I cannot tell you why the difference was but I mean it's I cannot answer that question for you sitting here. Sorry. Your other questions Judy?

**Judy Hong - Goldman Sachs**

On Java and what's happening to the competitors landscape and?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

We are just seeing that there has been a lot of other brands that have jumped into the market and what we do seem to be seeing is sort of a [indiscernible] slowing down in consumer demand for the energy plus coffee sort of category. The actual category is continuing to grow. We are seeing the actual coffee category growing at quite a healthy rate according to the Nielson for coffee. But there is a there is a lot of more competition and obviously we are also able to increase Monster more so as a percentage we just seeing a moderation there and we think that may continue going forward.

**Judy Hong - Goldman Sachs**

Okay.

**Rodney C. Sacks - Chairman and Chief Executive Officer**

Okay.

**Operator**

Our next question is from Kaumil Gajrawala with UBS

**Kaumil Gajrawala - UBS**

Hi, thank you.

**Rodney C. Sacks - Chairman and Chief Executive Officer**

Hi.

**Kaumil Gajrawala - UBS**

First question if you can gives an update on promotional activity including... internal activity to the degree in Southern California then what it was like national?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

Promotional activity we did at the end of last quarter approximately we saw that the whole category in California I had was down a couple of points so, we obviously took steps to look at the market to see what was happening and we did address the market through promotions and through more focused activity on our earn sales and distributors efforts in the market.

But other than that we've not particularly end mode [ph] promotional activity in California in preference to anywhere else. Most of all, promotional activity costs already related to the shelf programs that we've been introduced across the country to order to secure shelf space for our products and as well as sponsorships endorsements etcetera those cost similarly or simply in a determined by athletes and events wherever they may take place.

So there is no geographic limitation. Sponsorships have gone up cost of actually securing a sponsorship and athletes have increased what I refer to that on previous occasions that the cost of doing business with athletes in that extreme sports fight has gone up. But we all continuing to obviously use that as our promotion.

We obviously looked at spending money in that area with the sort of little fall of that we've experienced in the energy category and beverage sales in general. That line of customers to as a percentage little higher than we had initially budgeted for. But we were committed obviously to a lot of the marketing and the promotional steps for the year which we believe was it was so important for us to continue with both from a brand point of view and from a competitive point of view.

We're looking at the competitive landscapes. So they are pretty much inline with where we're what we have planned. Where the cost had increased in that item were the sponsorships of events and athletes in the United Kingdom. Will did have reply quite of big role in the, in our actual consolidated sponsorship line item which did increase. And so if you back that are those cost out which are extraordinary to the US operations and they are more inline with what we had anticipated.

**Kaumil Gajrawala - UBS**

Okay. And just to as there we think of the back half year, given the starting [ph] these that you spend when you are first rolling out jobs on incremental starting is enough spending [inaudible] base to reconsider it by now versus what is looking back in the first half of year?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

Change you minds.

**Kaumil Gajrawala - UBS**

give a sense.

**Rodney C. Sacks - Chairman and Chief Executive Officer**

I think that which will be pretty much continue on the level we have seen them now in this quarter.

**Hilton H. Schlosberg - Vice Chairman, President, Chief Financial Officer, Chief Operating Officer and Secretary**

This really affects the net sales.

**Rodney C. Sacks - Chairman and Chief Executive Officer**

Yeah.

**Kaumil Gajrawala - UBS**

And last question on inventories I think they are barely steadily been increasing, is it preparation of a roll out into these international markets or is it that the macro situation in?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

I think it's been a macro situation. We did obviously have some build up of inventories both here and overseas for the U.K. launch in order to assure we have products. So we ran some production as well. We also didn't want to be faced with an out of stock situation which although we didn't know we had sort of paid it, it could have bumped with just as it happened it leveled off.

But that because the reason there is limited production and there is a longer lead time to get that production we decided to build up the inventory rather to insure that we had inventories, depending on where the sales went. So we did that we have the inventory and we are now sort of working down through it it's its fine there's no problem with it, its good inventory and we are just work ourselves through it and adjust ourselves going into second half of the year.

**Kaumil Gajrawala - UBS**

Okay thank you very much.

**Hilton H. Schlosberg - Vice Chairman, President, Chief Financial Officer, Chief Operating Officer and Secretary**

Thank you.

**Operator**

Over to next Mark Astrachan with Stifel Nicolaus.

**Mark Astrachan - Stifel Nicolaus**

Good afternoon, guys.

**Rodney C. Sacks - Chairman and Chief Executive Officer**

Good afternoon, Mark.

**Mark Astrachan - Stifel Nicolaus**

First question just relating to your views on brand equity and pricing. I know we talked about this in the past, but given this success of the Monster brand and the equity it enjoys in category, have you given more thought to taking pricing at year end not necessarily to the same degrees as you did at the prior end but basically in line with some of the concentrate producers do outside the energy category, simply because it can do it, because you enjoy brand equity?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

We are really not looked to in that sense, we think that it's still premature for us. [Indiscernible] something we can introduce reasonably quickly if we feel that that's justified. We think we need to wait a few more months just see the general direction of where the economy is going.

We obviously anticipate pricing going up in things like raw materials, cans, and then sugar and possibly in dairy a little bit. But we think we need to get a better handle on the extent of that and what impact will have on us before we increase process. I think that is something that is on our mind.

That is definitely on the agenda would be a convenient time to do it at the end of the year. But we haven't made up our mind completely as to whether we will and if so to what extend.

**Mark Astrachan - Stifel Nicolaus**

Great. And then in terms of thinking about the cost environment, you have done a pretty good job of managing those costs particularly on the DST side of the business are there anything, any inputs there that are particularly concerning or anything that may change a bit more than we've seen in the past towards is it kind of steady as you go there?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

No. I think that early news that inline with everybody would wait and see what happens to world aluminum process that might have an impact on can process going forward.

**Hilton H. Schlosberg - Vice Chairman, President, Chief Financial Officer, Chief Operating Officer and Secretary**

Sugar.

**Rodney C. Sacks - Chairman and Chief Executive Officer**

Sugar as well but I think the main things is really more can process where we're not sure we all as we said we are expecting some increase in the dairy component of Java but we don't believe that it will be anywhere near what we had last year. But we'll have to pay that... show me that fluctuates from month to month.

**Mark Astrachan - Stifel Nicolaus**

Great. And then in terms of your usages of cash you spent about 50 million to buyback stock in quarter. One is, should we expect that sort of trend to continue going through the balance of the year and then secondly have you given any thought to doing other things with your cash positions like special dividends or anything else like that?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

We think that in fact, we believe that if anything we should be buying back our stock with the cash. Certainly to leave constrain as to when we can buy stock and we are pretty sensitive to having any sort of information of a creative or any nature that might be, have any perception of additional specialist knowledge and certainly [Ph] to that we do believe and or taken decision to back our stock quite aggressively but again that will be subject to legal advises to when we are in the position to do so and we propose to do so particularly at these gross levels

**Mark Astrachan - Stifel Nicolaus**

And will that include potentially extending any share re purchase commitment?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

I can't speak for the Board but yes, it's my personal give yes it would.

**Mark Astrachan - Stifel Nicolaus**

Well that's good to hear and then just a final question on comparisons with the third quarter on a month by month basis. Am I correct in remembering that the quarter gets easier as we go in particular I think September comparisons from last year were troubling. There was some slow down in trends there so it should be getting easier as we go through the quarter?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

I don't know. Pretty much you would... maybe able to expect later, it would maybe logical. We are still facing an economy where there is lot of uncertainty and there is an impact clearly on the buying patterns of consumers. I think we're continuing to see more and more retail and other customer valves coming through with showing reductions in foot traffic and reductions in purchases.

And so we just don't know what impact that will ultimately have. Obviously we also continue to ramp up then we have the additional job at Monster sales that took place last year, while we were securing distribution. So that was pretty erratic because we introduced it we sort of had some availability issues and so sales drop then we are able to more supply then sales reduced.

I don't in which months I don't know sitting here what that match was but that will play a part in our numbers going forward. But we feel we are starting to settle down and we are seeing some increased back in our own sales numbers and we think that as the economy sort of just stabilizes and people lose the shell shock of the higher gas prices and things that definitely help.

That obviously doesn't answer the weakness the macro economy but from a gas price point of view we think that things will start settling down a little bit as people get more used to these prices that are just going to probably become a way of life for us.

**Mark Astrachan - Stifel Nicolaus**

Okay. Thanks Guys.

**Rodney C. Sacks - Chairman and Chief Executive Officer**

Thank you.

**Operator**

We'll go next to Greg Badiskanian with Citigroup.

**Gregory Badiskanian - Citigroup**

Great, thanks. I just have a few quick questions. Can you maybe talk a little bit about how the core Monster product is doing X job in more mature markets? You mentioned California slowdown, are there some other markets that you'd look at, to kind of... kind of look at that growth, and do you have some numbers around that? I didn't mean to put you on the spot if you or just maybe just sort of anecdotally if you can, directionally tell us?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

Well, anecdotally according to Nielson, basically we're saying that if you take Java out of the mix, the didn't take it out of the category growth. For example, convenience and gas, we off sold Monster without Java its still increased sales, is substantially higher than the category growth.

**Gregory Badiskanian - Citigroup**

Great.

**Rodney C. Sacks - Chairman and Chief Executive Officer**

Both in excel sales and in sales per point. So the brands on it's own, it's clearly still ahead of the category, and still substantially ahead of basically of all the major competitors, it's substantially ahead of rock stars, red bull sales and rock star which in fact negative. If you take their job out of their products as well. So we are continuing to see solid sales in the core brand and that's what I referred to anyone the real ultimate cool product is your original work horse your flagship, Monster Green Energy 16 Ounce, single serve, and that is now the leading item in the energy category. And that's continuing to grow both in actual dollars and in sales... in dollar sales per point.

**Gregory Badiskanian - Citigroup**

I'm sorry, I missed the first part of the call. Did you give numbers around that?

**Hilton H. Schlosberg - Vice Chairman, President, Chief Financial Officer, Chief Operating Officer and Secretary**

Yes. Yes. We did..

**Gregory Badiskanian - Citigroup**

Okay, I'll listen to... I'll read the transcript.

**Rodney C. Sacks - Chairman and Chief Executive Officer**

Jus to give you the one marker, I just have to pick out the Los Angles market, you can take Monster without in the 13 weeks ended June 28 you take Monster without Java Monster we were positive in that market both in actual sales and in sales per point.

**Gregory Badiskanian - Citigroup**

Okay. So it's positive--

**Rodney C. Sacks - Chairman and Chief Executive Officer**

This was compared to red bull which was zero which reflects and rock star which was down on both those areas, both those criteria.

**Gregory Badiskanian - Citigroup**

Right. And when you look at... you had mentioned that in terms of Java, can you remind me in terms of just the comparisons because you are ramping you very nice incremental sales growth last year from Java, when do you start to say its still bit tougher compares where Java was kind of... out there at full force at retail?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

I think that we've still got a lot of work to do to get the additional SHUs for which we have a secured lot of shelf space in many types of that should have been implemented. We've seen reasonably good execution in the private, we've not yet seen really a full distribution of the Java Monster SKUs when you look at the actual your Java Monster SKUs on basically in the Nielsen number they drop up into the pretty much into the 20's very quickly.

**Gregory Badiskanian - Citigroup**

Yes.

**Rodney C. Sacks - Chairman and Chief Executive Officer**

And so we see, although we have rolled it out and we've seen a sort of stable handling of Java we think that with some focus we should be able to get the distributions levels of these newer product up to plus 50 which will have a positive impact. But as regards last year, Java by the time we have got to about August we started to get to sales. July, August pretty much that we're closer to where we are achieving sales now.

**Gregory Badiskanian - Citigroup**

Okay.

**Rodney C. Sacks - Chairman and Chief Executive Officer**

So that follow to get... there were some quite erratic in there was just a drop about in November and then it picked up again in December which were higher. So you... but if you take a sort of a moving average. It was much closer to where we are seeing, the average just now we are seeing some increase on it. But it is closer to where we are.

**Gregory Badiskanian - Citigroup**

Okay, alright. That's helpful. And then also just we would respect to your moderating sales growth which is still obviously doing a great job relative to the category. I mean we talk about it's a tough economy is that trading down and how much of its to may be just the category maturing, just when you look at the over all industry that to find out very significantly as well lately?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

Yes we think that overall industry growth and lot of that we believe has is due to the macro environment. It's just been a sort of a regulate stud on as the environment is getting tougher and we see that should be more morphed in California where we perceive that the effect of the slow down has been more marked on consumers, on construction, on property and mortgage, it's just everything that hit California particularly Blue collar workers and which is a large part of our consumer.

They're being hit more, they are going into the stores as much, they are not out there in convenient stores. So foot traffic and purchases particularly of our higher cost item is clearly impacted. By that and ultimately the pendulum does swing eventually and it turns so we believe that when that happens the energy category is stalled.

We think one of the exciting categories of the beverage industry. And we think that this will be category that will rebound more quickly than the other traditional categories which has been flattened and we're decreasing before the environment started this for example the coordinated products.

**Gregory Badiskanian - Citigroup**

California may be a tough example to speak of that's all see your more mature markets you have two factors impacting it. May be another market that's where the economy is doing a little better and it's more mature but that might be helpful. At some point just to kind of get some info from you there and the moving over to Hitman, can you talk a little bit about that on emerging category the energy shock category and can I have that product is position and what the opportunity is, do you think it will be incremental sells will be cannibalization and may talked about that?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

I think everybody competes for a share of stomach and that is an energy when I say that it is easy more traditional beverage. But in the energy category again you're getting consumers who are looking for an energy boost and then they will all clearly a percentage of consumers who whatever is an on, that first year, say will I need the energy boost but I don't necessarily need the liquid with it.

And there are obviously becoming the consumers who are gyrating towards the energy shots. So at all, there is some cannibalization, there is competition, it must obviously take from the categories so when we really look at the category, we believe the correct way to look at it is as one large category, and energy shots all simply part of that category. Just as we saw 8 ounce energy drinks and we're now selling 24 or 32 ounces, this is just going the other way.

So but we do see that category growing, it's an impulse purchase. Until now it's really been a little box on a sitting on the shelf of the convenient stores, we have seen convenient stores starting to design and change starting to design a racks to actually put because there are more competitors coming into the category that I have seen the product it is a high range for the convenient stores. So they are making good margin on it, so we see them designing racks and things where they can actually offer a selection of these products. They usually are sold bore doesn't necessarily mean that couldn't be somewhere getting him into the culture but they don't necessarily need to be because it is a small volume.

We think it will remain a niche within the energy category. But it will be part of it and if it's part of it you know we don't see any reason why we shouldn't be playing in that category and be a part for that reason we took the decision. We sort of saw and wanted it to mature it to a sufficiently high level to justify the costs and focus of launching products and putting efforts and manpower behind it.

We took the decision to enter that category and which we've done and we've designed the product. We have decided to go a little bit differently, we decided to increase the size to a three ounce serving. It's still a short, we call it a shoot out and basically we are going to roll that out pretty quickly. We think that will be incremental; it may be marginally... there will be some canalization but we think that it's at a good margin for us and it shouldn't result in a margin reduction.

**Unidentified Analyst**

The equal margin do you have products to stay?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

It's an at least equal to our basically is equal to the maid amongst the lions. Yeah.

**Unidentified Analyst**

Great we will look forward to seeing that in the stores. Thanks.

**Rodney C. Sacks - Chairman and Chief Executive Officer**

Thank you.

**Operator**

We go next to Alex Paterson with RCM.

**Alex Paterson - RCM**

Hey thanks for taking my question.

**Rodney C. Sacks - Chairman and Chief Executive Officer**

Sure.

**Alex Paterson - RCM**

Rodney, I was just curious in getting back to the question Judy was asking about. Try and understand the dynamics between what is seen in retail numbers and what seems to be going on at the shipment level and the fact that the retailers and distributors are clearly under pressure, probably trying to work their working capital. They are more efficiently inventory down etcetera. Are you getting...do you have a dialogue with AB or any of the other larger distributors that provides you some feed back on maybe these stocking trends or anything to that effect?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

We do have dialogs when we have talk with them but we've not been able to discern with any level of confidence what the reason is for the disconnect. We're knowing that they've been able to look to that has really pinpointed it and given us a comfort level to say okay we know what its I an if it is addressable in any way how we address that. We just basically a school fee the explanations of being destalking. explanations of that times are tough but we're not seeing any other reason for it and we just as I indicated we're very strong to coal [ph] we just don't know the difference or the reason for it. I mean we just we get the information, we have our own sales figures and what we're trying to put in together and may there is just a connected at the moment.

**Alex Paterson - RCM**

Understood I guess the key point there was a de-stocking can be short-term issue versus something that is clearly not. I gather at this point you just can't explain whether it is a short term issue or not?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

No, just de-stocking technically should be shorter but it does take time. But we don't know whether that is the only explanation or what the reason is. Bit as of it what we have noticed is the larger purchases and the purchases coming out of say, club stores just selling full packs. They have clearly been a slowdown in that area.

**Alex Paterson - RCM**

Yeah, understood. So, just quickly there is couple of other things. The on premise you talked about as a percent of sales did you give that number...

**Rodney C. Sacks - Chairman and Chief Executive Officer**

I didn't give a number for on premises as a percent of sales, no.

**Alex Paterson - RCM**

Is it material or is it getting anywhere?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

From a [indiscernible] perspective it's starting to get material but from a sales perspective it is still very small and that's a very still an expensive part of our business in order to achieve to get that business there are a lot of rebates, there're a lot of deals to basically lot of costs to get into that business. But I can't give you a figure of it. I don't have it handy on what we're selling there. But it's not material to the point that it will justify us breaking that out already starting to analyze that at this point.

**Alex Paterson - RCM**

Okay. The fourth quarter, when you have this... sorry--?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

I missed out a factor that is an important factor is that we all are making headway, it is slow but it is getting out before have to been able to get to the level of 14,000 accounts with indebt with that debt clearly just hitting in a wrong direction and then it's pretty moving ahead with some momentum.

**Hilton H. Schlosberg - Vice Chairman, President, Chief Financial Officer, Chief Operating Officer and Secretary**

nconsistent and part from them would go challenge green

**Alex Paterson - RCM**

Understood, understood it's a build up process. The fourth quarter when you had a ship in of before the price increase, obviously that creates an artificially tough comparison and it's not clear that everybody has digested that notion. Is that a fair assessment of how we should look at the fourth quarter?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

I don't think so. If your looking at comparisons, I think that you have really got to take the estimate of $20 odd million, $21 million we thought of in our off sales and it may have an impact a little more than that the deficit our base kits and actually when you factor that into just generally in the sales for the first six months that would be a fairer way to do it and we agree with it.

**Alex Paterson - RCM**

Okay and you mentioned a... maybe you'd have an analyst day one of these days getting ready for that?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

We probably will do an analyst day probably the idea would be to probably do that towards the end of the year that's where we are planning to probably do something in early December mid December going back to New York and actually have a reasonably extensive day. We are all planning to continue the midst, quarterly updates and we have got it we are going to try and time those updates, at a time when we're able to also have these proceeds to the most recent Nielsen numbers.

There was unfortunately the last time that happened we had the shelled meeting that we still felt obliged to have that update because we had indicated that to share holders and investors and but obviously it did not fall when I blast to do that that is why one of the reasons we would, have up to date, or more up to date. Nielsen numbers than we had already discussed at the shareholder meeting but going forward, mid theory of cold for the this kind of quarter we have to be in a position to be able to give an up-date on new sort of sea packs where the sales are going and where the economy is going

**Alex Paterson - RCM**

Okay and lastly I maybe... I know you do not talk about projections but so the degree you have seen or read or heard any major industry players or consultants regarding the front LRB market and energy drink grilled with in it, in these current economic times. Have you picked up any sort of commentary about expected growth rates for the category over the next few years?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

No, no. The last we have talked, what is really been impacting every body is the uncertainty of how the general economy has been affecting energy drinks perhaps might be a little disproportionately to other drinks and so we have seen it flow down that is perhaps been greater than one would have anticipated but we believe that that will also reverse at that same pace but just talking to people, they're very much in the air. They simply don't know they still think that this is the growth category in the whole beverage industry.

Even more than it haunts waters and we have the focus is on those two categories and that categories also slow dramatically I think the numbers that seem to have been published about that category and the bottom water resource sales that drop off has been even more amount than we have seen the energy category and just coming those higher price more sort of newer lines that we had to many this growth and they seem to be the drop of.

But we thing that well stabilize and people are going to get back to looking to what is new, what is different, what is exciting, what is summing that motivate them to buy the beverage and believe that it's kind a pick up again and focus again on the energy category because we believe that is still the category that provides some new alternatives some in new, some in different and as product that performs to consumers.

**Alex Paterson - RCM**

Okay thanks very much for the time Ron..

**Rodney C. Sacks - Chairman and Chief Executive Officer**

Pleasure thanks, Alex.

**Operator**

And your last question is from Judy Hong with Goldman Sachs.

**Judy Hong - Goldman Sachs**

Just following up the question about what is the long term outlook for the energy drink category and to the extent that we are in you know long period of consumer weakness in the US and the category really dozen pick up any time soon how much flexibility what is your willingness in terms of thinking about some of the suspending you know weather its sponsorship expenses or brand investment that you are you budgeting or you are thinking about doing at this point.

**Rodney C. Sacks - Chairman and Chief Executive Officer**

We are looking at that pretty closely we are looking at it literally on weekly basis we are looking at the discretionary spend because we do have historically been opportunistic in... we have about and we said, but we see a really good opportunity at a reasonable cost. We often have taken that opportunity and jumped on it very quickly, because that's been just the way we've started how we've done the business. And we're trying to introduce a little more constraint there because we think some of these deals aren't good, because again you can't go out and just spend and spend. At the same time, you don't want to end up starving your brand. We're building the brand for the long-term, the company for the long-term. And we don't want to be able to give up sometimes good properties or good athletes, and let them get... allow them to go by default to competitors, because we think that we will regret the day when it comes, next year when somebody else's got the rights to a particular event that we let past this year, that we couldn't get next year.

That being said, we are looking very carefully at our sponsorships, we're looking at trimming maybe areas that are peripheral to the direct core groups that we are at, we're perhaps we were trying to extend the brand and obviously extend the consumer base, where we feel that there is some uncertainty as to the real payback in that area, we obviously those ones we will pull back.

We will obviously be cautious about our sales, or as you can see, it ultimately in dollar terms the sales are continuing to increase and we obviously continue to... we need to continue to support the brand. But we will try and continue to marry our cost much more closely to our revenues. As we've indicated, the problem is sometimes that's a lot of these programs are basically are annual programs and you buy them and sign off on them yearly in advance and so the reaction time can't be quite as quickly. But we have already, I don't want to go into the detail of which one it is, but there is a particular program we have an option next year to extend it, and we... which was quite a high dollar amount, and we decided to put... we paused on it.

So we will do that as we continue to go ahead and manage the brand, but we again I reiterate that we're not going to pull back, that's the wrong message on just virtuously [ph] on spending, we think that's a short term solution and not a long-term solution for the brand. On the other hand, we are trying to be responsible about it and not simply saying we are developing a brand at all costs and simply ignoring the bottom line, but we are trying to create a balance between the two.

**Judy Hong - Goldman Sachs**

Okay. And then just a clarification, you talked about the soda cost in Europe. But any dilution in the first quarter $0.02 dilution in the second quarter. Are you basically saying we are pretty much done with those expenses or those losses?

**Rodney C. Sacks - Chairman and Chief Executive Officer**

I am not sure. I wouldn't... I think that the third quarter may see... maybe a small also coming from there. We are starting to see a lot of good listings, we are actually getting listings for the some of the big retailers, both in the grocery section, in the what they the call, the gas station section and in some of the independents. And we all starting to make some headway. But a lot of those listings are coming in the third quarter and are coming later in the year. So I am not sure what impact that sales will have. The result is we are... because we believe that marketing and promotional spend will be lower in the third quarter because a lot of the programs were took place and occurred in the second quarter, but there still will be some I think some loss coming through from the UK in the second quarter... third quarter, sorry.

It will be helped by some of the sales that are now going through to distributors in Sweden, Spain and hopefully before the end of the quarter, we think Ireland as well. That will help us, but it maybe it will be reduced but it may be smaller. But certainly if I think by the fourth quarter we will hope to get into a more stable position in Europe.

**Judy Hong - Goldman Sachs**

Thank you.

**Rodney C. Sacks - Chairman and Chief Executive Officer**

Thank you.

**Operator**

Ladies and gentlemen, this will conclude today's question-and-answer session. I would like to turn the conference back to Mr. Sacks for any additional closing remarks.

**Rodney C. Sacks - Chairman and Chief Executive Officer**

Thank you. Just in closing, I just want to thank everybody for attending the call. This is... we are trading in difficult times. I think many people don't quite appreciate the extent I think of the difficulties that are facing the U.S. economy. We really do dissect a lot of the consumer product companies' results, I mean you focus on their North American divisions or businesses. Invariably, they are all negative and down.

So, we believe that the achievement we've managed to achieve at this stage is very good. We are very happy with that, we are taking the steps to expand internationally. We have a number of other prospective countries in mind. We are going through and taking on the necessary stock to help support that expansion now. Rome wasn't built in a day. We believe we'll get there. We are looking at other ways to secure stronger distribution partners overseas.

And you know the main message I want to give to investors is that our brand is really healthy, it's really strong. Despite all of this, we are continuing to take market share. We are now the leading brand in certain of our SKUs which is unbelievable and unbelievable achievement we think for the company.

And we are continuing to grow, we are exciting new products on the drawing board. And so we've just believe in the long-term that our company and brand will continue to prosper and lead the growth in the energy category. And I just thank everybody for the support and we'll give everyone a further update when we have our interim conference call. Thank you very much.

**Operator**

Ladies and gentlemen, that does conclude today's teleconference. We appreciate your participation and you may disconnect at this time.

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